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IN THE SUPREME COURT

OF THE UNITED STATES

1241

_____ TERM, 1966

MARGARET C. MORRISON — Petitioner

vs.

UNITED STATES OF AMERICA — Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CARL A. SWAFFORD

NINTH FLOOR, MACLELLAN BUILDING
CHATTANOOGA, TENNESSEE 37402

Attorney for Petitioner

INDEX

Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	2
Statement	3
Reasons for Granting the Writ	4
Conclusion	10
Appendix	11

CITATIONS

Cases:

Maurer v. United States, 284 F2d 122	5, 5, 6, 8

STATUTES

Statutes:

Internal Revenue Code of 1954:	
Sec. 165 (26 U.S.C. 1958 ed., Sec. 165)	2, 3, 4, 5, 7, 8, 9, 15, 19
Sec. 1231 (26 U.S.C. 1958 ed., Sec. 1231)	2, 3, 4, 5, 6, 7, 8, 9, 14, 15, 16, 17, 18, 19
Technical Amendments Act of 1958, P.L. 85-866, 76 Stat. 1609, Sec. 49	5

IN THE SUPREME COURT OF THE UNITED STATES

____TERM, 1966

NO. _____

Margaret C. Morrison *Petitioner*

v.

United States of America *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUT

The petitioner, Margaret C. Morrison, by her attorney prays that Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above styled case on January 25, 1966.

OPINIONS BELOW

The opinion of the District Court for the Eastern District of Tennessee, Southern Division, is reported at 230 F. Supp. 989, and a copy of same is included in the

certified record. (R.7a). The opinion of the Court of Appeals for the Sixth Circuit is reported at ____ F. 2d ____ and a copy of same is also made a part of the certified record.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was made and entered on January 25, 1966. The jurisdiction of this court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether an otherwise qualifying casualty loss is subject to the provisions of Section 1231 of the Internal Revenue Code of 1954, even though it is wholly uncompensated for by insurance and admittedly deductible in full as an ordinary loss under Section 165 (c) if not covered by Section 1231.

The District Court answered "No" to this question. The Court of Appeals, in reversing and remanding this case, in effect answered this question "Yes".

STATUTES INVOLVED

The pertinent portions of Sections 165 and 1231 of the Internal Revenue Code of 1954 are set forth in the Appendix.

STATEMENT

This suit was commenced as a suit for the recovery of federal income taxes under the provisions of Title 28, U S C Section 1346 (a). The basic undisputed facts are: In 1960 your petitioner herein sustained a loss to her personal residence, resulting from damage caused by an ice storm to trees, shrubbery and other improvements upon the premises. The amount of the undisputed loss was Five Thousand Dollars ($5,000 00), none of which was compensated for by insurance or otherwise in any amount. In the same year your petitioner realized a gain in the amount of Eighteen Thousand Nine Hundred Thirteen Dollars and Forty Cents ($18,913.40) upon the sale of an orange grove which had been held by your petitioner for income producing purposes On the federal income tax return for 1960. your petitioner treated the loss from the storm damage as a casualty loss and and deducted it as an ordinary loss under the provisions of Section 165(c) (3) of the Code. Your petitioner treated the gain from the sale of the orange grove as a gain from the sale of a capital asset under the provisions of Section 1231 (a) of the Code.

The government took the position that the casualty loss was an involuntary conversion of a capital asset held for more than six months which was converted into other property or money and, as such, had to be netted against the gain from the sale of the orange grove in accordance with Section 1231 (a). Your petitioner contended, and still contends, that the casualty loss is deductible as an ordinary loss under Section 165 (c) (3) of the Code.

On the suit for refund, the District Court agreed with your Petitioner and held:

> "Even when dealt with in isolation from any other section, a rather involved process of rationalization and a series of inferences must be drawn to conclude that Section 1231 treats an uninsured casualty loss to residential property as a 'comp ulsory and involuntary conversion' of a capital asset. When viewed in context with Section 165, this Court is of the opinion that the latter section would con trol the deductibility of an uninsured casualty loss to residential property. The reasoning of the Appellate Court in the *Maurer v United Statcs* case, *supra*, appears the more compelling and cogent to this Court."

The Court of Appeals for the Sixth Circuit dis agreed with the District Court and held that the loss in question is subject to the provisions of Section 1231 (a) of the Code.

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because it is in direct conflict with the decision of the Court of Appeals for the Tenth Circuit in the case of *Maurer v. United States*, 284 F. 2d 122, (C.A. 10, 1960). In addition, review is appropriate because of the far reaching effect this decision will have on the large number of other taxpayers. The type

of loss involved herein is not an unusual tax loss but one that is sustained by taxpayers nearly every day of the year As a result of the two conflicting Court of Appeals decisions many taxpayers are now faced with the problem of whether to deduct the loss as an ordinary loss under 165 (c) (3) of the Code and bear the cost of appealing from an adverse decision of the government or netting the loss against their 1231 gains and thereby overpay their taxes in the event this Court ultimately rules for the taxpayer s position in this matter

There is no question but that the two Court of Appeals decisions are in conflict. The Court of Appeals for the Sixth Circuit recognized this fact and made the following appropriate comment

> We realize that the question presented on this appeal is a close one and while we have great respect for the opinion of the Tenth Circuit, we believe that the view we take is the more logical one and that it conforms to the intent of Congress in enacting the legislation.

The government may well contend that there is no conflict because the taxable year involved in the *Maurer* case, *supra*, was prior to the passage of the Technical Amendments Act of 1958, P L 85–866, 72 Stat. 1606, Section 49 (a). However such an argument is completely without merit since the Act in question did not change the substantive meaning of Section 1231 (a) but simply excluded from its coverage uninsured losses arising from the destruction, etc.,

of (1) property used in a trade or business or (2) a capital held for more than six months and held for the production of income. Thus, no change was made which might in any way effect the applicability of Section 1231 (a) to the type of loss involved in the instant case. Moreover, the opinion in the *Maurer* case was not rendered until 1960 which was some time after the passage of the Technical Amendments Act of 1958. As a result the Tenth Circuit was well aware of the Amendments. Of course the Government knows this is true since it relied heavily on the Amendments in its brief in the *Maurer* case.

In addition to the conflicting decisions mentioned above this case should be reviewed because it is erroneous and therefore will have an adverse effect on an extremely large number of taxpayers in similar situations. As stated previously the tax situation involved herein is very common. Your petitioner contends the decision is erroneous because Section 1231 (a) is clearly aimed at involuntary conversions of capital assets held for more than six months where *other property of money* is received in return.

Upon close examination of the wording of Section 1231 (a) it can be seen that the wording:

> "If during a taxable year, the recognized gains on sales or exchanges of property used in the trade or business, plus the recognized gains from the compulsory or involuntary conversion (as a result of destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation or the threat or imminence thereof) of property used

> in the trade or business *and capital assets held for more than 6 months into other property or money* ** "(*Emphasis supplied*)

indicates an intention to include gains and losses from the sale and involuntary conversion of (1) property used in a trade or business and (2) capital assets held for more than 6 months and which are converted into other property or money. Consequently, if such capital asset is not converted into other property or money, the provisions of Section 1231 (a) are not applicable. Such rationale clearly is indicated

While it may be possible for Sections 165 and 1231 (a) to overlap, Congress clearly pre empted Section 165 (c) in instances where the casualty loss was uninsured, since only through such means could the property of your petitioner have been converted into other property or money.

However, the overlapping effect of Sections 165 (c) and 1231 (a) are not to follow as a natural consequence. This is especially true when examining the sequence of sec tions of the Internal Revenue Code. Section 165 (c) is a part of a Code section which is headed "Losses". But there are nine different subsections of this master section defining losses which are deductible. One of these subsections is 165 (f) which reads:

> "Capital Losses. Losses from sales or ex changes of capital assets shall be allowed only to the extent allowed in Sections 1211 and 1212."

Thus, the question arises, are casualty losses of a capital asset deductible under Section 165 (c) or 165 (f)? The obvious answer lies in the wording of Section 165 (c) which unequi vocally permits the deduction of losses of property not connected with a trade or business if such losses arise from

fire, storm, shipwreck or other casualty **." Consequently, your petitioner contends that Section 165 (c) causes losses of this peculiar nature to become ordinary losses, which by definition do not arise from capital assets. If such property is not a capital asset, then clearly Section 1231 (a) is not applicable.

As stated by the trial court in its opinion

> "It appears to the Court that the fallacy in the position of the government is that it seeks to deal with and interpret Section 1231 in isolation from all other sections of the Internal Revenue Code. The government in its brief totally disregards Section 165 and treats Section 1231 as if it were the only pertinent section to the issue in this lawsuit. As stated in the *Maurer* case:
>
> "Section 165, and its predecessor 23 (e), have traditionally been the means for deducting uncompensated casualty losses from income where, as here, the property is non income producing."

Despite the clear language of the code section, the Sixth Circuit relied on so-called legislative history to conclude that the loss in question should be netted against 1231 (a) gains. Your petitioner submits that legislative history, while a great aid to courts in determining the intent of Congress, cannot be used to completely change the meaning of a code section. However, this is exactly what the Sixth

Circuit did in the instant case. Proof of this can be easily established by studying the provisions of Section 1231 (a) and 165 (c) (3) without the aid of any committee reports. By using this approach it is impossible to reach the decision arrived at by the Court of Appeals for the Sixth Circuit. Your petitioner contends that if the Congress wants all uncompensated losses to be covered by Section 1231 (a) then the code section should be amended to so provide. In the meantime the code section should be limited to the type of gains and losses specifically described therein.

In this regard, and as pointed out previously, the District Court, in deciding this case favorably to your petitioner, made a very apt observation:

> "Even when dealt with in isolation from any other section, a rather involved process of rationalization and a series of inferences must be drawn to conclude that Section 1231 treats an uninsured casualty loss to residential property as a 'compulsory and involuntary conversion' of a capital asset."

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner

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APPENDIX A

Internal Revenue Code of 1954:

SEC. 165. LOSSES.

(a) *General Rule.*--There shall be allowed as deduction any loss sustained during the taxable year and not compensated for by insurance or otherwise.

* * * * * *

(c) *Limitation on Losses of Individuals.*--In the case of an individual, the deduction under subsection (a) shall be limited to—

(1) losses incurred in a trade or business;

(2) losses incurred in any transaction entered into for profit, though not connected with a trade or business; and

(3) losses of property not connected with a trade or business, if such losses arise from fire, storm, shipwreck, or other casualty, or from theft. * * * No loss described in this paragraph shall be allowed if, at the time of filing the return, such loss has been claimed for estate tax purposes in the estate tax return.

* * * * * *

(26 U.S.C. 1958 ed, Sec. 165.)

SEC. 1231. PROPERTY USED IN THE TRADE OR BUSINESS AND INVOLUNTARY CONVERSIONS.

(a) [as amended by Sec. 49 (a), Technical Amendments Act of 1958, P.L. 85-866, 72 Stat. 1606] *General Rule* --If, during the taxable year, the recognized gains on sales or exchanges of property used in the trade or business, plus

business, plus the recognized gains from the compulsory or involuntary conversion (as a result of destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation or the threat or imminence thereof) of property used in the trade or business and capital assets held for more than 6 months into other property or money, exceed the recognized losses from such sales, exchanges, and conversions, such gains and losses shall be considered as gains and losses from sales or exchanges of capital assets held for more than 6 months. If such gains do not exceed such losses, such gains and losses shall not be considered as gains and losses from sales or exchanges of capital assets. For purposes of this subsection—

(1) in determining under this subsection whether gains exceed losses, the gains described therein shall be included only if and to the extent taken into account in computing gross income and the losses described therein shall be included only if and to the extent taken into account in computing taxable income, except that section 1211 shall not apply; and

(2) losses upon the destruction, in whole or in part, theft or seizure, or requisition or condemnation of property used in the trade or business or capital assets held for more than 6 months shall be considered losses from a compulsory or involuntary conversion.

In the case of any property used in the trade or business and of any capital asset held for more than 6 months and held for the production of income, this subsection shall not apply to any loss, in respect of which the taxpayer is not compensated for by insurance in any amount, arising from fire, storm, shipwreck, or other casualty, or from theft.

* * * * * *

(26 U S C 1958 ed., Sec. 1231.)

No. 16162

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

MARGARET C. MORRISON,
Plaintiff-Appellee,

v.

UNITED STATES OF AMERICA,
Defendant-Appellant.

ON APPEAL from the United States District Court for the Eastern District of Tennessee.

Decided January 25, 1966.

Before: WEICK, Chief Judge, CELEBREZZE, Circuit Judge, and CECIL, Senior Circuit Judge.

CECIL, Senior Circuit Judge. This is an appeal by the government as defendant-appellant from an order of the United States District Court for the Eastern District of Tennessee granting judgment to Margaret C. Morrison, plaintiff-appellee. The plaintiff-appellee brought the action in the District Court to recover upon a claim for income taxes alleged to have been erroneously and illegally collected by the government. Both parties filed a motion for summary judgment. The court sustained the motion of plaintiff-appellee and denied the government's motion. The government appealed. The parties will be referred to as the taxpayer and the government.

In 1960, the taxpayer sustained a loss to her personal residence, resulting from damage caused by an ice storm to trees, shrubbery and other improvements upon the premises. The amount of the loss was fixed at $5000, none of which was compensated for by insurance or otherwise in any amount.

In the same year, the taxpayer realized a gain in the amount of $18,913.40 upon the sale of an orange grove which had been held by her for income producing purposes. Upon her tax return for the year 1960, the taxpayer treated the gain from the sale of the orange grove as a gain from the sale of a capital asset under the provisions of Section 1231(a) of the Internal Revenue Code of 1954.[1] She treated the loss from the storm damage as a casualty loss and deducted it as an ordinary loss under the provisions of Section 165(c)(3) of the Code.

The District Director took the position that the loss was an involuntary conversion of a capital asset held for more than six months and, as such, it had to be netted against the gain from the orange grove, in accordance with Section 1231(a). A question of law is presented involving the construction of Sections 165(c)(3)[2] and 1231(a)[3] of the Code.

It is conceded by the government that the loss in question here qualifies as a casualty loss within the terms of Section 165(c)(3) and that if it is not also covered by Section 1231(a), it is deductible in full as an ordinary loss. It is likewise agreed

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[1] Sectional references are to the Internal Revenue Code of 1954. (Title 26, U.S.C.)

[2] (a) General Rule.
There shall be allowed as a deduction any loss sustained during the taxable year and not compensated for by insurance or otherwise.
(b) Amount of deduction.
For purposes of subsection (a), the basis for determining the amount of the deduction for any loss shall be the adjusted basis provided in section 1011 for determining the loss from the sale or other disposition of property,
(c) Limitation on losses of individuals.
In the case of an individual, the deduction under subsection (a) shall be limited to—
(1) Losses incurred in a trade or business;
(2) Losses incurred in any transaction entered into for profit, though not connected with a trade or business, and
(3) Losses of property not connected with a trade or business, if such losses arise from fire, storm, shipwreck, or other casualty, or from theft. * * *

[3] If, during the taxable year, the recognized gains on sales or exchanges of property used in the trade or business, plus the recognized gains from the compulsory or involuntary conversion (as a result of destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation or the threat or imminence

that the gain from the sale of the orange grove was properly reported under Section 1231(a). This section does not define either income or losses. It only provides for the treatment of certain gains as gross income and certain losses which have the status of income and losses by virtue of other sections of the Revenue Code. (Section 1231(a)(1).) Historically, Section 1231(a) is the successor to Section 117(j) of the 1939 Revenue Code and was enacted by Section 151(b) of the Revenue Act of 1942. It was enacted to give special additional benefits to taxpayers in the form of reduced tax rates (Capital gain rates) for certain items of income. The apparent purpose was to allow taxpayers, whose property had been seized in furtherance of the war effort, a capital gain rather than an increase in ordinary income. Had it not been for the provisions of Section 1231(a), the gain from the sale of the orange grove would have been taxed as ordinary income. *Helvering* v. *Flaccus Leather Co.*, 313 U.S. 247.

It is undisputed that Section 1231(a) in effect provides for the netting of gains and losses, recognized by other sections

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thereof) of property used in the trade or business and capital assets held for more than 6 months into other property or money, exceed the recognized losses from such sales, exchanges, and conversions, such gains and losses shall be considered as gains and losses from sales or exchanges of capital assets held for more than 6 months. If such gains do not exceed such losses, such gains and losses shall not be considered as gains and losses from sales or exchanges of capital assets. For purposes of this subsection—

(1) in determining under this subsection whether gains exceed losses, the gains described therein shall be included only if and to the extent taken into account in computing gross income and the losses described therein shall be included only if and to the extent taken into account in computing taxable income, except that section 1211 shall not apply; and

(2) Losses upon the destruction, in whole or in part, theft or seizure, or requisition or condemnation of property used in the trade or business or capital assets held for more than 6 months shall be considered losses from a compulsory or involuntary conversion.

In the case of any property used in the trade or business and of any capital asset held for more than 6 months and held for the production of income, this subsection shall not apply to any loss, in respect of which the taxpayer is not compensated for by insurance in any amount, arising from fire, storm, shipwreck, or other casualty, or from theft.

of the Revenue Code, arising out of certain types of transactions. These transactions are sales or exchanges of property used in trade or business, the compulsory or involuntary conversion, *into other property or money*, of property used in the trade or business and capital assets held for more than six months. If the recognized gains from such transactions exceed the losses from such transactions, the gains and losses shall be considered as gains and losses from sales or exchanges of capital assets held for more than six months. In other words, the taxpayer is allowed capital gains treatment which he would not be entitled to if it were not for Section 1231(a).

It is claimed on behalf of the taxpayer that because there was no conversion into *other property or money* the loss in question here is not included in the type of losses intended to be covered by Section 1231(a). We do not agree.

The last paragraph of Section 1231(a) as it now appears in the Code was added by Section 49 of the Technical Amendments Act of 1958. (72 Stat. 1642.) By this amendment, Congress excluded from the application of this section, property used in the trade or business and any capital asset held for more than six months *and held for the production of income*, where the taxpayer was not compensated by insurance in any amount. It is significant that Congress did not exclude the classification of "capital assets held for more than six months."

Prior to the amendment, the applicable Treasury Regulations on Income Tax 1954 Code, provided

> "Losses upon the complete or partial destruction, theft, seizure, requisition or condemnation of property are treated as losses upon an involuntary conversion whether or not there is a conversion of the property into other property or money." T.D. 6253, 1957-2 Cum. Bull. 547, 551.

This same interpretation of the law has been in the Treasury Regulations since 1943,[4] the year following the initial passage

[4] T.D. 5217, 1943 Cum. Bull. 314, 317.

of the Act. We recognize that no validity can attach to a Treasury Regulation if it is inconsistent with the statute. It should be noted, however, that in the face of the long existence of this Regulation at the time of the 1958 amendment, Congress did not add "capital assets held for more than six months" to the two enumerated exclusions in the amendment. Nor had Congress taken cognizance of it in previous legislation.

Treasury regulations may acquire the force of law and we think the regulation with reference to Section 1231(a) is in that category. In *Helvering* v. *Winmill*, 305 U.S. 79, 83, the Court said:

> "Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law."

See also *Cammarano* v. *United States*, 358 U.S. 498, 510; *Boehm* v. *Commissioner*, 326 U.S. 287, 291, reh. den. 326 U.S. 811; *Commissioner* v. *Flowers*, 326 U.S. 465, 469, reh. den. 326 U.S. 812; *Commissioner* v. *South Texas Lumber Co.*, 333 U.S. 496, 501, reh. den. 334 U.S. 813; *Lykes* v. *United States*, 343 U.S. 118, 126, reh. den. 343 U.S. 937; *Massachusetts Mutual Life Ins. Co.* v. *United States*, 288 U.S. 269, 273; *United States* v. *Moore*, 95 U.S. 760, 763; *Hastings and Dakota Railroad Co.* v. *Whitney*, 132 U.S. 357, 366; *Logan* v. *Davis*, 233 U.S. 613, 627; *Swendig* v. *Washington Water Power Co.*, 265 U.S. 322, 331; *Fawcus Machine Co.* v. *United States*, 282 U.S. 375, 378; *Brewster* v. *Gage*, 280 U.S. 327, 336.

It is apparent from the report of the Finance Committee of the Senate that it took the same view.

> "Your committee has provided this section to separate certain uninsured casualty losses from the computation of Section 1231 gain or loss, but only with respect to property used in the trade or business and capital assets held for the production of income which have been held

> more than 6 months. The amendment applies with respect to, for example, loss incurred as the result of the destruction of a taxpayer's oil tanks which he used for oil storage in his trade or business, but on which he was unable to obtain insurance. On the other hand, *the amendment does not apply to loss arising from the destruction or theft of the taxpayer's uninsured personal automobile.*" (Emphasis added.) (S. Rept. No. 1983, 85th Cong., at p. 203.)

This illustration is identical to the taxpayer's loss in the case at bar.

We conclude that the taxpayer was not entitled to deduct her loss as an ordinary loss under Section 165(c)(3) of the Code. The loss must be offset against the gain from the sale of the orange grove under Section 1231(a).

Although Section 1231(a) was enacted over twenty years ago there have been very few decisions interpreting the section and they have all been fairly recent. The leading case decided in favor of the taxpayer is *Maurer* v. *United States*, 284 F.2d 122, C.A. 10 (1960). The District Court for the Western District of Missouri, Western Division, followed *Maurer* in *Oppenheimer* v. *United States*, 220 F.Supp. 194 (1963). In our own circuit, the District Court for the Eastern District of Tennessee, Southern Division, followed the *Maurer* case in *Killebrew* v. *United States*, 234 F.Supp. 481 (1964), *Hall* v. *United States*, 64-2 USTC Decision 9770 (1964), and in the case now before us. The *Killebrew* and *Hall* cases are now pending in our Court on Appeal. Recently, July 30, 1965, the Tax Court of the United States, in an opinion reviewed by the Court, decided a case involving the same issue in favor of the government. *E. Taylor Chewning and Caroline M. Chewning*, Petitioners v. *Commissioner of Internal Revenue*, Respondent, 44 T.C. 678; CCH 44 TC No. 63, Decision 27,507. This case is now pending on petition for review in the United States Court of Appeals for the Fourth Circuit.

We realize that the question presented on this appeal is a close one and while we have great respect for the opinion of the Tenth Circuit, we believe that the view we take is the more logical one and that it conforms to the intent of Congress in enacting the legislation.

The judgment of the District Court is reversed and the case remanded for further proceedings consistent with the views herein expressed.

SUPREME COURT, U.S.

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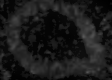
No. 1287

In the Supreme Court of the United States

OCTOBER TERM, 1987



In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1241

MARGARET C. MORRISON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The issue in this case is whether § 1231 of the 1954 Code requires petitioner to offset a casualty loss against certain capital gains, as the Commissioner contends, or whether, as petitioner contends, she may deduct the casualty loss against her ordinary income.

Petitioner sustained an uninsured $5,000 loss to her personal residence in 1960, resulting from damage caused by an ice storm to trees, shrubbery and other improvements upon the premises. In the same year petitioner also realized a gain in the amount of $18,913.40 upon the sale of an orange grove which had been held by her for the production of income. On her 1960 tax return she treated the gain from the sale

218-592—66

of the orange grove as capital gain under the provisions of § 1231(a) of the Internal Revenue Code of 1954. She treated the casualty loss as an ordinary loss under the provisions of Section 165(c)(3) of the Code. (Pet. 14–15.)

The Commissioner took the position that the $5,000 casualty loss to petitioner's home, which was a partial involuntary conversion of a capital asset held for more than six months, fell within § 1231, and that it thus had to be netted against the gain from the sale of the orange grove, with the excess of the gain over the casualty loss being treated as capital gain (Pet. 15). Petitioner paid the deficiency and sued for a refund. The district court held that the $5,000 loss was not covered by § 1231 and that it was deductible in full as an ordinary loss. The court of appeals reversed. (Pet. 20.)[1]

Section 1231 of the Code (Appendix, *infra*, pp. 5–6) provides, in general, that gains and losses from certain types of transactions shall be netted against each other, and that if the net result is a gain, it will be taxed as capital gain, but if the net result is a loss, it will be treated as an ordinary loss. The transactions covered by § 1231 include (1) all gains and losses from "sales or exchanges of property used in the trade or business" and (2) all gains and losses from "the compulsory or involuntary conversion (as a re-

[1] If § 1231 covers the casualty loss, petitioner will have a net capital gain in 1960 of $13,913.40 (the orange grove gain less the casualty loss). If § 1231 does not cover the loss, petitioner will have an $18,913.40 capital gain (the orange grove gain) and a $5,000 ordinary loss (the casualty loss).

sult of destruction in whole or in part, theft or seizure * * *) of property used in the trade or business and capital assets held for more than 6 months into other property or money."

It is undisputed that petitioner's gain from the sale of her orange grove falls within § 1231. It is also undisputed that the casualty loss on petitioner's home was an "involuntary conversion * * * of [a] * * * capital asset held for more than 6 months." Petitioner contends, however, that § 1231 does not cover this uninsured casualty loss because the property was not converted "into other property or money."

Prior to 1958 § 1231 made no express reference to wholly uninsured casualty losses, and there is no indication that Congress had ever thought of them as a special class. In that year, however, Congress carefully considered whether uninsured casualty losses fell within § 1231. It amended that section to exclude from the coverage of § 1231 uninsured casualty losses to property (1) used in a business or (2) held for the production of income.[2] The Committee Report on the legislation stated (1) that before the amendment *all* uninsured losses were covered by § 1231, and (2) that after the amendment § 1231 would continue to cover uninsured casualty losses *on property held for personal use* but would thereafter not cover uninsured losses on property held for use in a business or for the

[2] Technical Amendments Act of 1958, P.L. 85–866, 72 Stat. 1606, Section 49. This amendment was effective as to all tax years beginning after December 31, 1957. *Id.*, § 49(b). See Appendix, *infra*, p. 6.

production of income.[3] Therefore, regardless of what the law was before 1958, it is clear that after the 1958 amendment § 1231 covers uninsured casualty losses to property held for personal use for more than 6 months.

Petitioner argues that the instant decision conflicts with *Maurer* v. *United States,* 284 F. 2d 122 (C.A. 10). However, that case involved a pre-1958 casualty loss. Therefore, the language of the statute at the time of the transaction involved in *Maurer* was materially different from the statute here in question. There is no conflict among the courts of appeals as to the meaning of § 1231 as amended in 1958.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.
MITCHELL ROGOVIN,
Assistant Attorney General.
DAVID O. WALTER,
WILLIAM A. FRIEDLANDER,
Attorneys.

MAY 1966.

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[3] S. Rep. No. 1983, 85th Cong., 2d Sess., pp. 74–75, 203–204 (1958–3 Cum. Bull. 922, 995–996, 1124–1125) (Appendix, *infra*, pp. 7–8).

APPENDIX

Internal Revenue Code of 1954:

§ 1231. Property used in the trade or business and involuntary conversions.[1]

(a) *General Rule.*—If, during the taxable year, the recognized gains on sales or exchanges of property used in the trade or business, plus the recognized gains from the compulsory or involuntary conversion (as a result of destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation or the threat or imminence thereof) of property used in the trade or business and capital assets held for more than 6 months into other property or money, exceed the recognized losses from such sales, exchanges, and conversions, such gains and losses shall be considered as gains and losses from sales or exchanges of capital assets held for more than 6 months. If such gains do not exceed such losses, such gains and losses shall not be considered as gains and losses from sales or exchanges of capital assets. For purposes of this subsection—

(1) in determining under this subsection whether gains exceed losses, the gains described therein shall be included only if and to the extent taken into account in computing gross income and the losses described therein shall be included only if and to the extent taken into account in computing taxable income, except that section 1211 shall not apply; and

[1] Material added by the Technical Amendments Act of 1958 (*infra*, p. 6) shown in italics.

(2) losses upon the destruction, in whole or in part, theft or seizure, or requisition or condemnation of property used in the trade or business or capital assets held for more than 6 months shall be considered losses from a compulsory or involuntary conversion.

In the case of any property used in the trade or business and of any capital asset held for more than 6 months and held for the production of income, this subsection shall not apply to any loss, in respect of which the taxpayer is not compensated for by insurance in any amount, arising from fire, storm, shipwreck, or other casualty, or from theft.[2]

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[26 U.S.C. 1231.]

Treasury Regulations on Income Tax (1954 Code):

§ 1.1231–1. *Gains and losses from the sales or exchange of certain property used in the trade or business.*

* * * * *

(e) *Involuntary conversion.*—(1) *General rule.* * * * Losses upon the complete or partial destruction, theft, seizure, requisition or condemnation of property are treated as losses upon an involuntary conversion whether or not there is a conversion of the property into other property or money unless subparagraph (2) of this paragraph applies. For example, if a capital asset held for more than 6 months, with an adjusted basis of $400, but not held for the production of income, is stolen, and the loss is not compensated for by insurance or otherwise, section 1231 applies to the $400 loss.

(2) *Certain uninsured losses.* Notwithstanding the provisions of subparagraph (1) of this paragraph, losses sustained during a taxable year beginning after December 31, 1957, with respect to both property used in the trade or busi-

[2] See note 1.

ness and any capital asset held for more than 6 months and held for the production of income, which losses arise from fire, storm, shipwreck, or other casualty, or from theft, and which are not compensated for by insurance in any amount, are not losses to which section 1231(a) applies. Such losses shall not be taken into account in applying the provisions of this section.

* * * * *

[26 C.F.R., Sec. 1.1231–1.]

S. Rep. No. 1983, 85th Cong., 2d Sess., pp. 74–75, 203–204 (1958–3 Cum. Bull. 922, 995–996, 1124–1125):

Under present law where there are uninsured losses on property as a result of its destruction, theft, seizure, requisition, or condemnation, such losses, in the case of property used in the trade or business or capital assets held for more than 6 months, are treated as section 1231 losses. * * *

Where a taxpayer elects to be a self-insurer against casualty losses, there seldom is a conversion into money or other property, as there would be if the destroyed property were insured. If this casualty loss were the only loss incurred during the taxable year by the self-insured person, he would be entitled to the full benefit of an ordinary loss deduction under section 1231, but where there are also 1231 gains, the casualty loss is partially or wholly offset against these gains which would otherwise be taxed as capital gains. * * *

* * * The provision added makes section 1231 inapplicable in the case of losses where the taxpayer is not compensated for the loss by insurance, if the loss arises from fire, storm, shipwreck, or other casualty or from theft. This treatment is to apply, however, only in the case of property used in the trade or business and in the case of capital assets held for

more than 6 months and held for the production of income. * * *

* * * * *

This section amends section 1231(a) of the 1954 Code by making it inapplicable to any loss in respect of which the taxpayer is not compensated by insurance in any amount if the loss arose from fire, storm, shipwreck, or other casualty, or from theft, and the loss occurred with respect to property used in the trade or business or a capital asset held for more than 6 months and held for the production of income.

Under Section 1231, uninsured casualty losses on depreciable property or real estate used in the trade or business or on capital assets must be aggregated with various other types of section 1231 gains and losses. * * *

Your committee has provided this section to separate certain uninsured casualty losses from the computation of section 1231 gain or loss, but only with respect to property used in the trade or business and capital assets held for the production of income which have been held more than 6 months. The amendment applies with respect to, for example, loss incurred as a result of the destruction of a taxpayer's oil tanks which he used for oil storage in his trade or business, but on which he was unable to obtain insurance. On the other hand, the amendment does not apply to loss arising from the destruction or theft of the taxpayer's uninsured personal automobile. * * *

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